In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-797

JAMES A. ASHTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his use of the mails was not sufficiently related to the fraudulent scheme charged in the indictment to sustain his conviction under the mail fraud statute and that the evidence did not establish a fraudulent scheme.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent three-year prison terms, subject to parole eligibility after he had served three months, and was fined $300 on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner, an attorney, had been retained by Beatrice and Jack Hommer to prosecute their personal injury claims against the City of Hope,

Arkansas (I Tr. 61-63).[1] In late 1971 or early 1972, the Hommers authorized petitioner to settle their claims against the City of Hope with the understanding that Mrs. Hommer would receive $25,000 and Mr. Hommer would receive $4,000 from the settlement (I Tr. 63-64). On January 21, 1972, the insurers of the City of Hope issued two checks to petitioner: one payable to John and Beatrice Hommer and to James Ashton, attorney, in the amount of $25,000; and the other payable to John Hommer and James Ashton, attorney, in the amount of $8,155.57 (II Tr. 7). Without informing the Hommers that their claims against the City of Hope had been settled, petitioner deposited the two checks in his personal bank account (II Tr. 12-13; Gov't Exhs. 30, 31, 37).

Mrs. Hommer frequently contacted petitioner thereafter to inquire whether he had made any progress in settling the case (I Tr. 66). Petitioner always told her that he was continuing to work on the settlement, but that she would not receive any money until the entire case had been settled (I Tr. 65-66).[2] Finally, Mrs. Hommer contacted petitioner in late 1972 and informed him that she desperately needed money to defray family medical expenses. Petitioner did not disclose to Mrs. Hommer that he had received substantial settlement proceeds approximately eight months earlier, but he agreed to advance her some money. Petitioner mailed Mrs. Hommer a check for $2,500 in November 1972 and an additional check for $2,500 in January 1973 (I Tr. 38-39, 69-70). These two mailings,

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[1]Mrs. Hommer's claim stemmed from physical injuries she had suffered as a result of an automobile accident. Mr. Hommer's claim was based on loss of consortium following the accident (I Tr. 61-62; Pet. 3).

[2]The Hommers had also filed suit against the owners of another automobile that had been involved in the accident (I Tr. 63).

which the government argued at trial had been designed to placate Mrs. Hommer and to permit him fraudulently to retain possession of the settlement proceeds (III Tr. 19-20), formed the basis of the charges against petitioner. After discovering in March 1974 that petitioner had settled her claim against the City of Hope more than two years earlier, Mrs. Hommer demanded and received payment from petitioner (I Tr. 67-70).

Petitioner sought at trial to justify the two-year delay in remitting the settlement proceeds to Mrs. Hommer by attempting to show that marital difficulties between the Hommers had spawned a dispute concerning appropriate allocation of the settlement proceeds between them and that he had not been able to obtain Mr. Hommer's release of all claims against the proceeds until March 1974, at which time he promptly paid Mrs. Hommer. Mrs. Hommer testified, however, that she and her husband were not separated until June 1972 (I Tr. 81), some five months after petitioner had secretly deposited the settlement proceeds in his own account, that petitioner never had informed Mr. Hommer about the January 1972 settlement (I Tr. 92-93), and that Mr. Hommer never had disputed her claim to $25,000 of the proceeds of any settlement that might be negotiated with the City of Hope (I Tr. 81-82).

1. Petitioner first contends (Pet. 6-18) that his use of the mails to send Mrs. Hommer the two $2,500 checks was not sufficiently related to the scheme charged in the indictment to be deemed "for the purpose of executing" the scheme, within the meaning of 18 U.S.C. 1341. More specifically, he argues (1) that the scheme had been fully executed when he received and deposited the settlement checks in January 1972, and that the subsequent mailings therefore could not have been made for the purpose of executing the scheme, and (2) that use of the mails must have been necessary and have been contemplated from the outset of the scheme to be within 18 U.S.C. 1341. These contentions are without merit.

The fact that petitioner had received and deposited the settlement proceeds in his personal bank account in January 1972 does not mean that his scheme to defraud Mrs. Hommer of the proceeds of the settlement was fully executed at that time. The offense charged in the indictment, and established at trial, was of a continuing nature. The extent of the benefits that petitioner could expect to realize from the scheme depended upon his being able to withhold the settlement proceeds from Mrs. Hommer as long as possible. The two $2,500 checks that he mailed to Mrs. Hommer were an integral and material part of the scheme; they were calculated to lull her into a false sense of security, to forestall further inquiry concerning settlement of her claim against the City of Hope and, thus, to permit the fraud to continue without detection. See *United States* v. *Sampson*, 371 U.S. 75; *United States* v. *Ashdown*, 509 F. 2d 793, 799-800 (C.A. 5); *United States* v. *MacClain*, 501 F. 2d 1006, 1012 (C.A. 10).[3]

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[3]Petitioner's reliance upon *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, is misplaced. In neither *Kann* nor *Parr* did this Court lay "down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' [a fraudulent] scheme." *United States* v. *Sampson*, *supra*, 371 U.S. at 80. In *Kann*, which involved a fraudulent check cashing scheme, and *Parr*, which involved the fraudulent use of a credit card, the perpetrators of the fraudulent schemes had realized all of the benefits that were possible when they cashed the checks or used the cards. The mails were used in those cases, not by the perpetrators of the scheme but by the drawee bank and the credit card company to collect from the victims. In both *Kann* and *Parr*, therefore, it was "immaterial to the consummation" of the schemes how—or, indeed, whether—the bank or the credit card company attempted to adjust their accounts with the victims.

The facts involved in *United States* v. *Maze*, 414 U.S. 395, also relied upon by petitioner, were similar to those in *Kann* and *Parr*. The fraudulent credit card scheme involved in *Maze* had already reached fruition at the time of the mailings, which were merely for the purpose of settling accounts between joint victims of the scheme and were not necessary to the scheme's effectuation or perpetuation.

Neither must use of the mails be absolutely necessary to the success of a fraudulent scheme to be within the mail fraud statute. The fraudulent scheme involved here could perhaps have been executed, as petitioner suggests (Pet. 9), without use of the mails had he required Mrs. Hommer to come to his office to pick up the two $2,500 checks. But the fact that delivery of the checks could have been effected without the mails does not preclude prosecution under the mail fraud statute so long as the mails were in fact used to execute the scheme—as they were here. *E.g., United States* v. *Flaxman,* 495 F. 2d 344, 348 (C. A. 7), certiorari denied, 419 U.S. 1031. In fact, in almost every prosecution under the mail fraud statute the defendants would be able to argue that means other than the mails could have been used to transmit items materially related to the success of the particular scheme. If accepted, petitioner's contention that only those fraudulent schemes that could not have been executed "but for" use of the mails effectively would render the mail fraud statute a nullity.

It is similarly irrelevant to a prosecution under the mail fraud statute that use of the mails may not have been contemplated from the outset. Petitioner apparently interprets this Court's statement in *Pereira* v. *United States,* 347 U.S. 1, 8-9, that one "causes" the mails to be used "[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen," to mean that the mailings must either be part of the scheme as originally contemplated or reasonably foreseeable in order to be within the mail fraud statute. As this Court noted in *United States* v. *Maze,* 414 U.S. 395, 399, however, the decision in *Pereira* established the test of whether one has "caused" the mails to be used, within the meaning of 18 U.S.C. 1341, and not whether that use was materially related to the

scheme. Petitioner does not dispute that he "caused" the mails to be used when he sent the two $2,500 checks to Mrs. Hommer.[4]

2. Petitioner also contends (Pet. 18-20) that the evidence at trial was insufficient to show that he had engaged in a scheme to defraud Mrs. Hommer. In support of this contention, he suggests first that the government failed to prove that Mrs. Hommer had a legal interest in the settlement proceeds he had deposited in his personal account. But this suggestion ignores Mrs. Hommer's testimony concerning the genesis of her claim against the City of Hope and her agreement with Mr. Hommer regarding the disposition of any proceeds that might be realized from settlement. When viewed in the light most favorable to the government (see *Glasser* v. *United States*, 315 U.S. 60, 80), the evidence established Mrs. Hommer's legal interest in the proceeds of the settlement.

Finally, petitioner argues that there was insufficient evidence of a scheme to defraud because the government failed to prove that he had "converted" Mrs. Hommer's funds. This argument proceeds from the fact that bank records introduced at trial indicated that a portion of the settlement proceeds, sufficient to cover petitioner's obligation to Mrs. Hommer, remained intact in his account. However, the government was not required to show that petitioner used the proceeds for any particular form of personal gain in order to show that he had defrauded Mrs. Hommer. *E.g.*, *United States* v. *Gaskill*, 491 F. 2d 981, 984-985 n. 5

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[4]Contrary to petitioner's contentions (Pet. 7), *United States* v. *Sampson*, *supra*, is not to the contrary. This Court held in *Sampson* only that an indictment charging a scheme which from the outset contemplated mailings to lull prior victims into inaction was sufficient to charge violation of 18 U.S.C. 1341. *Sampson* did not hold that the mail fraud statute is not violated unless use of the mails was foreseeable at the outset or was part of the original scheme.

(C.A. 8). Proof of petitioner's unauthorized, secret deposit of Mrs. Hommer's funds into his own account was sufficient to establish his fraudulent conversion of those funds.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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